No. 11,152

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY (a corporation),
Appellant,

vs.

A. QUANDT & SONS (a co-partnership),
Appellee.

APPELLANT'S REPLY BRIEF.

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I.

KNOWLEDGE OF CANCER BY THE INSURED IS NOT IN ISSUE IN THIS CASE.

The appellee's brief contains pages of arguments regarding an insured's lack of knowledge of a disease which an insurance company claims was concealed from it. None of this matter is relevant here for these reasons:

A. The Appellant Admits Quandt Had No Knowledge of the Cancer.

In appellant's opening brief it was pointed out that no claim is made that the insured knew he was suffering from cancer. The point of knowledge therefore is

not in issue, nor was it at the time of the trial. As will be again pointed out, later in this brief, knowledge is not an element of the defense upon which the appellant relies under the sound health clause of the policy.

B. No Claim Is Made That the Insured Concealed From the Company a Knowledge of Cancer.

It was also pointed out in appellant's opening brief that on this appeal no reliance is had upon any concealments or misrepresentations; the appellant rests solely on the sound health clause of the policy.

It is of course the law that an insurance company seeking to avoid a policy because of concealments made in the application for the insurance must prove that the applicant had knowledge of the diseases or matters concealed. However, this rule has no application whatever to this appeal where it is not claimed there was any concealment. The discussion, therefore, by the appellee on pages 5 and 6 of its brief and the cases there cited regarding concealment and proof of knowledge have no bearing whatever on the questions here before the Court.

C. Knowledge Is Not an Element of the Defense Under the Sound Health Clause. If the Insured Be Not in Sound Health at the Time of the Delivery of the Policy the Insurance Does Not Take Effect, Regardless of Whether He Knows of the Condition of His Health.

At the outset, it may be pointed out that the appellant has no quarrel with the definition of "good health" stated in *Burr v. Policy Holders Life Insurance Association,* 128 Cal. App. 563. However, we

point out that the appellee in its statement of this definition on page 3 of its brief, inadvertently, no doubt, has omitted a portion of the definition stated in the decision. The definition there stated at page 566, with the portion omitted by the appellee in italics, is as follows:

> "The term 'good health' in the life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life *or with a malady which has some bearing on the general health.* It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences."

No one will contend that a person suffering from cancer is not afflicted with "a malady which has some bearing on the general health".

Nor has appellant any quarrel with the definitions of good health, illness and disease as stated in *Northwestern Mutual Life Insurance Co. v. Wiggins,* 15 Fed. (2d) 646, at 648. Certainly anyone, layman or otherwise, understands that a person who has cancer is not in good health, and must understand that a policy which states that it does not take effect unless the insured be in good health does not take effect if the insured, in fact, has cancer.

The provision of the application and of the policy in the instant case upon which the appellant relies is:

> "It is agreed * * * that the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health."

This provision has nothing to do with any misrepresentations or concealments by the insured. It does not depend upon the insured's knowledge of his lack of sound health. It does *not* say the policy will not take effect *only if* the insured knows he is not in sound health, or *only if* he conceals this fact.

Rather the provision is an outright, unqualified, agreement that if the insured in fact be not in good health then the insurance does not take effect. Its effect does not depend upon his knowledge.

The appellee apparently concedes that no rule of law prevents the parties to an insurance contract from entering into such an agreement. Its brief does not claim the clause to be invalid and it cites no decision holding it to be invalid. Neither *Clarke v. New Amsterdam etc.* or *Wills v. Policy Holders etc.,* cited on page 6 of the appellee's brief, so holds.

Nor do these decisions hold that, in order to establish a defense under the sound health clause, it is necessary to prove that the applicant had knowledge of his lack of sound health; in fact, the clause in question is not even involved in the cases cited:

1. The *Wills* case holds merely that a company attempting to avoid a policy on the ground that the assured concealed the existence of a disease from the company must prove not only that the assured was afflicted with the disease but also that he was aware of it.

2. The *Clarke* case is no more in point. This was a suit on an accident policy in which the question at

issue was whether the assured's death was caused solely by accidental means. The company contended that heart disease contributed to the assured's death. The Appellate Court ruled, and obviously properly, that there was sufficient evidence to support the jury's conclusion that no heart disease existed in the assured. As is indicated at page 79 of the decision the evidence in this regard showed:

> "Just before the operation a slight leak of the tricuspid valve was discovered but according to the testimony of his physician the heart was then functionally normal and was propelling the blood through the body. The autopsy revealed no abnormal condition of the lungs or liver indicative of any chronic heart condition."

This evidence obviously justified the jury's conclusion.

The language from the Clarke decision quoted by appellee on page 6 of its brief has been lifted by counsel from the following statement made by the Court at page 79 of the decision in discussing other evidence regarding the heart condition:

> "But there was no showing that this condition was pathological or that it was even unusual in a man of the age of the assured. Naturally, a man of sixty or more would have less power to resist evil consequences resulting from an accident than a younger person would possess, but an insurer accepting as premiums the money of a client of advanced years may not complain of that fact. It has been held that the existence of unknown conditions tending to shorten the life of the as-

> sured does not nullify a policy. (Citing cases.) It may be conceded that morbid conditions induced by bodily injury may be more readily caused and more deadly in result when the victim is an aged person than in the case of a healthy youth, but that concession would not excuse the insurer of the maturer individual. If the accidental injury produces morbid change in the exercise of vital functions, which in turn results in death, the injury and not the morbid change is held to be the cause of death."

The lone sentence plucked by counsel from this discussion obviously has no bearing on the issue before this Court.

On the other hand, as has been pointed out at page 6 and the following pages of our opening brief, the Courts hold the sound health clause to be a valid binding agreement. Its effect does not depend upon knowledge by the assured. If the assured in fact is not in sound health at the time of the delivery of the policy then the insurance provided thereby does not take effect, regardless of any knowledge of the insured of his lack of sound health:

> "If the insured is at the time of the delivery of such policy actually afflicted with a disease which continues and ultimately causes his death, according to the weight of authority it is immaterial whether such condition existed at the date of his application or arose between that date and the delivery of the policy, *or whether the insured knew his condition in that respect or not.* In such cases such condition of health on the part of the insured at the time of the actual delivery of

the policy is a defense to an action thereon, unless a valid waiver of such stipulation is shown." (Italics ours.)

Wright v. Federal Life Ins. Co. (Tex.), 248 S. W. 325.

The matter cannot be stated more clearly than it was by the Court in *Murphey v. Metropolitan Life Insurance Co.*, 116 Minn. 112, 118 N. W. 355, cited in our opening brief at page 9, in which the Court said:

> "It is clear from the language of the policy that the defendant's promise of insurance was not absolute, but conditional, and that the existence of life and sound health in the insured on the date of the policy is the condition upon which the promise is made. *It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one's opinion or belief that he was in sound health.*" (Italics ours.)

The sole question remaining on this appeal therefore is whether the appellant is correct in contending that the evidence shows without conflict that the assured Quandt, at the time of the delivery of the policy, was afflicted with a cancer of the bowel which caused his death. If he had such a cancer it necessarily follows that he was not in sound health. The appellee's contention, at page 7 of its brief, that there is a conflict in the testimony in this regard is next considered.

II.

THE TESTIMONY OF DR. BOSTICK THAT THE INSURED HAD A CANCER AT THE TIME OF HIS DEATH ON APRIL 4, 1944, AND AT THE TIME OF THE DELIVERY OF THE POLICY ON DECEMBER 4, 1943, IS UNCONTRADICTED. THERE IS NO CONFLICT WITH THIS TESTIMONY.

It is true, as appellee points out and indeed it is admitted for purposes of this appeal by the appellant, that at the time his application was taken in November, the assured Quandt appeared to be in sound health. The witness Wood so testified. Likewise there was testimony, and it is also admitted by the appellant, that Dr. Cox and Dr. Mitchell who examined him in November and in March, respectively, of 1943, then found him to be in apparent good health and neither found evidence of cancer.

Neither doctor suspected he had a cancer of the bowel and neither examined him for the express purpose of determining if he had a cancer there or elsewhere.

Neither doctor denied or so much as questioned that Quandt had a cancer on April 2, 1944 and died of it. Neither denied that he had the cancer when the policy was delivered on December 4, 1943, 4 months earlier; neither questioned it—in fact they were not even asked if Quandt then had a cancer. To the contrary the implication of their testimony is that Quandt had the cancer but was unaware of it, which was undoubtedly the fact. Thus Dr. Mitchell testified when examined by counsel for the appellee:

> "Q. You know the ailment that caused the death, or contributed to the death of Mr. Quandt?

A. I do.

Q. What was that?

A. From what I understood, he had a carcinoma, a cancer.

* * * * * * *

A. Now, Doctor, is it possible for a patient to be afflicted with cancer such as Mr. Quandt had and he not know it?

A. Yes."

(Tr. pp. 61, 62.)

Likewise Dr. Cox under examination by counsel for appellee testified:

"Q. Doctor, is it possible for a patient to be afflicted with cancer and not know it?

A. Surely, it depends upon how far it has advanced.

Q. Then as I take it he might have cancer and not know it, himself?

A. He could for quite some length of time, that is true."

(Tr. p. 53.)

And each doctor testified that they would not regard a person having cancer as one who was in sound health. (Tr. pp. 53, 63.)

In this testimony we submit there is no contradiction of the testimony given by Dr. Bostick. He testified that he found on the autopsy, and that Quandt did in fact have, and died from, on April 4, 1944, a cancer of the bowel approximately six inches in diameter. How long this cancer had existed, particularly whether it was in existence 4 months earlier on December 4, 1943, the date of the delivery of the policy, was

the question before the trial Court. *The only evidence* offered on that subject was the testimony of Dr. Bostick. He testified positively not only that the cancer was then in existence but that in his opinion it had been in existence for at least a year, that is, since April of 1943. Particularly he testified that beyond any possibility of a doubt it was in existence at the time the policy was delivered:

> "Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man in November, 1943, approximately five months prior to his death?
>
> A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively."
>
> (Tr. p. 87.)

We repeat that *this testimony is uncontradicted.* Nothing said by Dr. Cox or Dr. Mitchell is in conflict with it. Neither denied that he had a cancer at the time in question *nor indeed even expressed any opinion as to whether he did or did not then have a cancer.*

Under these circumstances it is submitted that there is no conflict in the evidence on the question whether the assured had a cancer at the time of the delivery of the policy. Cases cited by the appellee in its brief hold nothing to the contrary: *Mutual Life Insurance Co. v. Frey,* cited by the appellee, has already been discussed by the appellant at page 9 of its opening brief. As is there pointed out, the language of the policy in the *Frey* case is different from that involved

in the instant case and was held merely to require that the assured be in the same condition of health on the date of the delivery of the policy as he was at the time the application was taken. The Court there held, and under the evidence correctly, that there was no claim in that case that the assured's health had changed between the dates in question and therefore sustained the verdict of the jury that the applicant was in the soundness of health required by the application. This case obviously does not support appellee's contention that there is a conflict in the evidence in the present case.

Nor is *Lincoln National Life Ins. Co. v. Mathisen,* 150 Fed. (2d) 292, authority for appellee's position. The trial Court there found that delivery of a policy was made on April 14, 1943 and that the applicant was then in good health. On appeal it was held that these findings were supported by conflicting evidence. What was the evidence presented on the issue of good health or as to the cause of death does not appear from the opinion and it is impossible to determine what evidence was held to create a conflict sufficient to support the Court's finding. All that appears in the opinion is the Court's statement that the trial Court's finding rested "on conflicting testimony, including that of medical experts". What the evidence was is not stated. This case therefore cannot possibly be said to be authority that a conflict exists in the evidence in the case now before the Court.

It is submitted that on the question at issue, namely, whether the cancer from which the assured died ex-

isted at the time of the delivery of the policy, there is only the testimony of Dr. Bostick, and that this testimony is uncontradicted. Under well settled law the trial Court is bound by this testimony. This has long been true in the State of California as to questions of this character:

> "The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases, neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual. In this proceeding the evidence of the medical experts as to the condition of the deceased's skull at the time of the autopsy, and the presence therein of the fracture, and the two hemorrhages, the extent and character of these hemorrhages, and their origin and cause, and the probable effect upon the deceased, and whether they, or either of them, was sufficient to produce death, dealt entirely with matters with which only medical men are familiar, and con-

cerning which they alone could give any intelligent information to the Commission. This evidence, being uncontradicted, was binding upon the Commission and, according to the above rule, the latter could not reject the same and act upon their own knowledge or conclusions."

William Simpson Construction Company et al., v. Industrial Accident Commission et al., 74 Cal. App. 239, 243.

There is, we submit, no conflict in the evidence on the question at issue.

CONCLUSION.

It is respectfully submitted that the evidence without conflict shows that the insured Quandt had a cancer of the bowel at the time of the delivery of the policy. He cannot therefore be held to be in sound health and the Court's finding in this regard is without support in the evidence and contrary to it.

Since the policy provided that the insurance was not effective if the assured was not in sound health at the time in question no recovery can be had upon the policy and the judgment should be reversed.

Dated, San Francisco,
February 11, 1946.

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